

Chapter 1 : INTRODUCTION

Introduction to Contracting for the State of Colorado

No doubt you have seen the previous version of this contract manual, the 3 inch thick *State of Colorado Contract Procedures Manual*. Along comes a new manual (referred to as the *Manual*) and you glance suspiciously at it because it doesn't seem any less threatening. Plus, it's probably supplemented by your own agency guidelines on internal contracting practices. Hopefully, this introduction will bridge the gap between whatever purchasing experience you have had in the past, and the confusing world of State contracting for goods and services. This *Manual* is an invaluable resource, containing the policies, procedures, and source documents of State agencies involved in reviewing and approving the purchase you make and the contracts you write. This introduction will be your first "baby step" in understanding the *Manual*, what some of these strange **TERMS** mean, and what some of the State agencies are responsible for doing.

You have all bought something. Many of you have made purchases for companies or businesses or agencies. Let's say you bought a \$2,000 computer system. If you were purchasing the computer system for a company or institution, you might have gone to the purchasing office and obtained the forms they use to make purchases. If you purchased the computer system for your family, you probably used whatever sales agreement form the dealer had available. You may have even negotiated a few "extras", like software or manuals. You signed the agreement, pulled out a checkbook, wrote the check, and took delivery. You may have even added in a few dollars for an extended maintenance agreement to cover past the warranty period. Presto! You just wrote a goods and services contract. You paid for the goods and services, the contract, with a "warrant," the State's version of a check.

Commitments and Commitment Vouchers

What you just did, the State does all the time, only it's just not as simple. State employees occupy a position of public trust in using money that is not their own. When a company makes mistakes in commercial purchasing it is free to return the merchandise or re-negotiate to have its needs met. In the State of Colorado, the legislature controls the purse strings and sets the rules about how the State's money is spent. Agencies have many different kinds of requirements for purchasing goods and services (e.g., office supplies and computer programming) for the State and on behalf of State programs (social services, job training programs, child health programs, etc.). Do you just take out your check book and pay? Not within the State system. Even worse, you are prohibited from asking someone to do the work in advance of having approval. Your "ordering" goods or services informally (in advance of getting the proper approvals) could make you personally liable for the amount. We call any kind of order that is a contractual obligation, like ordering a computer or having a training video filmed, a commitment. You are prohibited from making a commitment without complying with the requirements of law, which includes using a proper form for the agreement called a "commitment voucher" (e.g., contract or purchase order)

in the statutes. For clarity, we will use the term commitment document. If you did this unauthorized purchasing in a private company, you might be fired. If you did it at home you might get yelled at. If you do it in State government, it can be a criminal offense, and you might be held personally liable for the amount of the unauthorized commitment.

So, first lesson: *NEVER MAKE A COMMITMENT TO PURCHASE GOODS OR SERVICES FOR THE STATE WITHOUT AN APPROVED VALID COMMITMENT DOCUMENT.*

Getting Started

When most of us face a problem, we try to adapt something that has worked before. Most likely, you will go to someone in your agency to find a purchase order or contract for the same or similar good or service that worked and didn't get anyone in trouble! This is a smart approach that avoids "reinventing the wheel" unnecessarily. So once you have decided who needs to be involved in approval, and have some assurance that you aren't going to be wasting your time starting the process, you will start the vendor selection process--if you have delegated authority--or work with the Division of Purchasing to get a vendor selected. At the end of that process, you will be signing a contract or issuing a Purchase Order, probably one that looks a lot like one that was used before, and starting the approval process.

One Warning: NO contract--including a financial assistance agreement commonly known as a "grant"--is valid until approved by the Controller or his delegate. The Colorado *Special Provisions* that are attached to your contracts say that. [Purchase Orders, we shall see, do not require Controller approval and Attorney General review.] Vendors bear the risk if they start performance before contract approval, so vendors legally can not expect payment until the contract is fully reviewed and signed by the Controller. Consequently, you can't order a vendor to perform in advance of approval either. If you want an effective contract before the vendor starts performance, you have to plan ahead and start the process early enough to get the contract signed before performance of the contract must begin.

The State Controller

The State Controller's office is responsible for honoring (authorizing payment of) valid commitment documents, and for specifying the form of the documents. The State of Colorado Fiscal Rules state that a commitment voucher is "a purchase order, a contract, an approval travel authorization (for travel), an advice of employment (for hiring), or any other document appropriate to the transaction, prescribed by the State Controller". Purchase orders and contracts are the forms of payment used most often.

The State Controller determines not only the form of the commitment documents, but also specifies the offices that must approve these documents. The State Controller must approve all commitment documents in order for them to be valid. In fact, the Controller's signature is so important that the Colorado law says that, "[a]ny state contract involving the payment of money

by the state shall contain a clause providing that the contract shall not be deemed valid until it has been approved by the Controller or such assistant as he may designate.”

Never had to worry about this kind of approval before? So, you ask, "How do you get the Controller's approval?"

Just one note before we go any further: these rules apply to “amendments” too. If you get the Controller's approval for buying the \$2,000 computer, you can't just go back to the vendor the next day and negotiate a little \$400 amendment for three years of service. Think about it. It doesn't make a lot of sense for the law to require the Controller to approve commitment documents if agencies can turn right around and amend them by adding “stuff” and increasing the prices. So anything that is discussed in this summary really applies to amendments too, or anything that changes a contract: the price, statement of work, or terms and conditions.

Spending Authority

If you are new to contracting for your agency, you probably won't be on the cutting edge of issues concerning whether your agency has the authority to buy any specific goods or services or provide financial assistance through grants. Suffice it to say, though, the agency has to have authority. Most of what you purchase will probably involve previously purchased goods or services that are clearly necessary for operation of your agency. In that case, often the only authority issue is: do you have money? Because one of the statutory prohibitions is spending money in excess of appropriations, your agency will have a procedure for setting priorities among purchases. Also, once one of these commitment documents (e.g. contract or purchase order) is signed, an entry will be made (called an “encumbrance”) in a computer system (called COFRS), except for higher education institutions, that will tell the Controller that money has been committed against an appropriation, thus helping the Controller and the agency control spending.

There are other limits on spending you may encounter. For example, except for higher education institutions, there are limits on an agency's use of lease-purchase as a way of acquiring goods. Construction projects also require specific appropriations and procedures for controlling and accounting for spending. But assuming you have been given the authority to acquire goods or services for your agency, and there is money available, there should be no problem concerning your authority to spend the money. Spending authority and other preliminary planning considerations are covered in more detail in Chapter 2.

Purchase Order vs. Contract

Before we get too far into all of this though, let's learn about a few terms that were introduced earlier.

Purchase Order

When properly used, this document requires less time and effort than a contract because it does not have to be routed to some of the external approving offices. Maybe you have used these in commercial purchasing. When you go into a store, you are often signing a purchase order which

is immediately performed by delivery of the merchandise. In general (subject to exceptions too complicated to bring up here), a purchase order is used by the State for small purchases of services (less than \$25,000), and for simple purchases of goods, regardless of amount. The State's issuance of the order and description of the goods, services, price, and delivery terms on the front, coupled with the acceptance or delivery by the vendor, constitutes a valid commitment. Notice that all of the "boilerplate" language, like warranties, indemnification, delivery, prompt payment, and other terms and conditions are printed on the back of the purchase order. Most important, the contractor's signature does not even appear on the purchase order. If you ever had a business law course, you probably learned that this was a form of "unilateral contract," or an offer by one party which the other party may accept either in writing or by performance. Of course, if a good is shipped, this is as valid a "contract" as any other, and the vendor is entitled to be paid. There are times when a purchase order should not be used. Never sign a vendor contract in lieu of using a purchase order. The reasons for this will be covered later.

Contract

We call everything else a contract. Both parties sign the agreement, and it defines the goods or services to be performed, the price or cost, the time for performance or delivery, conditions for termination, how payment will be made, etc. The Controller sets the requirements for a contract (and the format for a purchase order) and each contract has to have something called the *Special Provisions*. A copy of the *Special Provisions* are in the *Manual* at Appendix A of Chapter 6. These *Special Provisions* work like the back of the Purchase Order and contain some of the same clauses, referred to as "boilerplate", that protect the State. For example, one paragraph states that Colorado law will apply to the contract. Obtain a purchase order and a contract from your agency so you can see the differences. You will notice one big difference between the purchase order and the contract. A purchase order is self-contained, except for the description of the good or service, the price, and the delivery terms. A contract, on the other hand, has very little written that is *boilerplate*. The *Special Provisions*, for example, say nothing about inspection and acceptance, warranties, payment terms, or any other important issues. The agency has a lot more flexibility on one hand, and a lot more risk on the other hand, when using a contract, because all of those basic contract issues have to be negotiated and written by the parties. Chapter 6, Appendix A, includes model provisions commonly found in State contracts.

Practical Difference Between a Purchase Order and a Contract

From the perspective of someone who is trying to get a contract signed and approved quickly, there is a difference in approvals. An Attorney General legal review is only required of a contract, not a purchase order, because a contract tends to be more tailored to the specific transaction and it generally takes longer for the agency to negotiate and write. This requirement flows from the fact that a "legal set of eyes" is probably a wise idea in a contract, where the agency is given so much latitude in defining the agreement.

The Department of Personnel

Just when you thought you had identified all of the "players", here comes another one, the Department of Personnel. No doubt, even if you did commercial business, you never had to go to the human resources department if you wanted to buy something. But the State is different,

because before you can even think about buying a “personal service,” you have to get approval from the Department of Personnel. A “personal service” is defined as hiring a contractor to perform work for the direct benefit of the State, similar to what an employee would do. To further expand on the definition of “personal services”, it means any time, effort, or labor performed by a human being. You can now see why the Department of Personnel needs to review personal services agreements.

Without going into too much detail, a few years ago, a lawsuit was brought against the State for laying off State employees and hiring contract employees to do the same work. The initiative was called “privatization”. The State lost, and the Colorado legislature passed a law that requires the Department of Personnel to review and approve all “personal services” contracts. This is an extremely complex and sensitive area, but usually the Department of Personnel will approve service contracts where the State does not have the capability of performing the services needed. A contract may also be approved where the State needs to avoid a conflict of interest, such as hiring outside auditors.

What does this mean to you? It means that for any “personal service,” you better have approval from the Department of Personnel or know why it is not required. In all agreements for personal services, purchase orders and amendments included, you have to have Department of Personnel approval. The two simplest exceptions to this rule are: 1) one-time, non-recurring personal service contracts for six months or less, and 2) contracts with political subdivisions--City and County of Denver or Larimer County, for example. If these exceptions apply, no coordination or approvals are required from the Department of Personnel. Chapter 3 has more information concerning this approval requirement.

Even when you seek approval to contract for personal services, the Department of Personnel has another important function. They review the contract to make sure the agency is not unwittingly creating an “employment” relationship that could expose the State to IRS claims for federal income tax withholding, liability under workman’s compensation statutes, or claims for unemployment compensation. You will be submitting an “independent contractor” certification to the Department of Personnel as part of the review process to insure that what you have is really an “independent contractor” relationship. You will also be putting a clause in your contract reminding the contractor that the contract creates an independent contractor relationship. For more information, turn to Chapter 3 of the *Manual*.

Remember that there is a difference between having a contract reviewed and having it approved. Most all personal services commitment documents, regardless of the dollar amount, have to be reviewed prior to being approved. Just because “the last contract was approved” does not mean you do not have to submit a similar contract for review. This is one of the most common mistakes agencies make, thinking that because a contract is sure to be approved they do not have to submit it for review.

Let’s talk about this computer purchase that you may have made personally, and pretend your agency needs one, as well as extended maintenance services for five years. Well, a contract or purchase order to buy the computer (a “good” not a “service”) need not be coordinated with the

Department of Personnel. A service contract or purchase order for maintenance services does. It meets none of the exceptions, unless of course you can get someone employed in the City and County Denver to commit to maintain your agency's computer!

Group I, Group II and Undelegated Agencies

Before you go any further with this summary, I suggest that you go to the person who hired you or assigned you to this job and ask this question, "Are we a Group I, Group II, or undelegated agency?" If that person doesn't know, tell them this summary said not to read any further until you get an answer. That is because a lot of what is going to be said about who needs to be involved depends on your agency's purchasing delegation. Some agencies, like the Departments of Corrections, Natural Resources, Human Services, Labor and Employment, and most of the higher education institutions, have delegated purchasing authority and are called "Group II" agencies.

Division of Purchasing

If you are involved in purchasing, the Division of Purchasing has a comprehensive purchasing training program that you should demand to attend at the threat of mutiny! We are not going to cover its material with anywhere near the depth of its training, but you need to know their role in the contracting process.

Unlike your private purchasing experiences, or even those in commercial purchasing, the State has restrictions on how you select a vendor or company to purchase goods or services. With certain exceptions (grant contracts with local governments being one of the biggest), you will learn in purchasing training that contractors must have a chance to "win" our business by bidding on projects. Competition not only equitably distributes the State's business, it also helps insure fair prices for the goods and services we buy. It's not just a matter of fairness, either. If the procedures are not followed, then competitors can "protest" awards of contracts and may even go to court to block their performance. All this means that, even if you know exactly what your contract or purchase order is going to say, and you have written the best contract language in the world, you can't shove it across the table to a company for signature unless you have complied with the procurement code rules for competition in selecting the vendor.

Colorado law requires competitive bidding for public construction projects, called "public works" contracting. Also, Colorado has a Procurement Code that State agencies must follow when purchasing goods and services. The code has lots of provisions governing contract administration, construction contracting, and resolution of disputes in contracts, but the parts that will most directly affect you are the rules governing selection of vendors. Generally, the code applies to all contracts funded with public money except: bridge and highway construction by the Department of Transportation; professional services contracts with architects, engineers, landscape architects, and surveyors; and contracts with other governments.

The Division of Purchasing publishes rules to implement the Procurement Code. Aside from contracts not covered by the Procurement Code, the State Purchasing Director is given the authority to procure or supervise the procurement of all goods and services needed by the State. As you can probably guess, the Division of Purchasing could not hope to do all of this itself, and it delegates purchasing authority to other agencies in the State. Still, even when purchasing authority is delegated, agencies have to follow the rules written by the Division of Purchasing.

Many of these rules have to do with how to select vendors. These requirements, more than probably any other, make State purchasing different than private and commercial contracting. So, where you or a private company can simply walk into a computer retail store and buy computers, the State has some very specific rules. These rules are more completely discussed in Chapter 4 of the *Manual*.

Competitive Sealed Bidding and Competitive Sealed Proposals

The preference in purchasing is for competitive sealed bidding. Sealed bidding is used when requirements for goods or services are well defined, and the agency can write the requirements specific enough so companies can just bid a price. The agency writes an Invitation for Bid ("IFB") document that is sent to bidders (or "offerors") and that contains the specifications or statement of the work and other terms and conditions. By a date designated in the IFB, the bidders submit their bid in a sealed envelope. The agency opens the bids publicly and reads the prices. The agency makes the contract award (accepts the bid) to the bidder who is responsible (has the capability in all respects to perform fully and with the integrity and reliability which will assure successful performance), responsive (submits a bid that complies in all material respects with the IFB), and has the lowest price.

Another competitive method of "source selection" is competitive sealed proposals. This technique is used when requirements or specifications cannot be formulated with enough specificity so offerors can submit firm, fixed price bids for the contract. In this type of procurement, the agency defines its requirements and the terms and conditions of the subsequent contract with as much specificity as possible and sends out a Request for Proposal ("RFP"). The offerors are asked to submit proposals in accordance with instructions in the RFP. Typically, offerors submit a detailed description of how they intend to do the work, as well as a breakdown of their price or costs. After receipt of proposals, the agency will evaluate the offers and may conduct "discussions" with offerors about their proposals. If discussions are conducted, offerors are given a chance to revise their proposals and submit a Best and Final Offer ("BAFO"). The contract award is made to the offeror whose proposal is most advantageous to the State, price/cost and other factors considered. Typically, the RFP tells offerors that price/cost is not the most important criteria, and technical superiority in a proposal is given more weight and sometimes can "win" the contract award. This is sometimes called a "best value" source selection.

As you can probably sense, these procedures are complicated and are governed by complex statutory requirements and rules written by the Division of Purchasing. About the only generalization one can make is that the procedures are designed to give offerors equal opportunity

to win State business. The two different procedures differ in the amount of information required from the offeror/bidder, the amount of resources necessary by the agency in evaluating offers and selecting winners, and the complexity of the contract that ultimately is signed. The two processes are the same with the emphasis placed on limiting contact with offerors. After the beginning of a solicitation by either sealed bidding or competitive sealed proposals, all offerors should be treated alike in terms of information released. You should be cautious about the nature of communications with individual offerors. Almost all substantive communications are included in IFB or RFP amendments and released simultaneously to all potential offerors.

Delegation of Purchasing Authority

So who does all of this work? This is where the delegations come in. If your agency is a Group II agency, it has delegated authority to do vendor selection, including the selection of the method of procurement and the conduct of the solicitations. If your agency is a Group I agency, it essentially has independent purchasing authority up to \$25,000 for services and \$10,000 for goods. If you are in a nondelegated agency, well you can't do much--only buy goods and services up to \$1,000. For Group I and nondelegated agencies, purchases of goods and services in excess of these limits have to be done through the Division of Purchasing. Be careful: these purchasing delegations do not apply to construction or construction-related contracts.

Along with the delegation limits established by the Division of Purchasing, the Procurement Rules create exceptions to all the competition requirements for small purchases. Makes sense, doesn't it, not to have to send out formal IFBs and RFPs for the one time purchase of a computer worth only \$2000? Otherwise the cost of administering the competition is greater than the goods or services are worth. Group II agencies can procure services up to \$25,000 and goods up to \$5,000 without the benefit of competition. Group I agencies can purchase services up to \$25,000 and goods up to \$1,000 without the benefit of competition. For nondelegated agencies, the Division of Purchasing also has small purchase authority and can satisfy your "purchase requisitions" for small purchases without competition. By the way, purchases of goods worth more than the "no competition limits" and up to \$10,000 (Group I) and \$25,000 (Group II) can be done by a less formal process called "documented quotations." You will be trained on that, and can find more information in the purchasing section of the *Manual*. Generally, any good or service worth more than \$25,000, no matter who the agency is, has to be procured using competition, *unless* a valid State Price Agreement exists, (see Annex C, Glossary of Terms).

Purchase Orders? Contract? Which one?

When you go to the training by the Division of Purchasing, you will hear a recurring theme. There are issues of vendor selection, e.g. which vendor you can do business with, and there is a different issue of how you record your purchase, e.g. what does the contract have to look like? Now, if you are a nondelegated agency or Group I agency buying something outside your authority, you and Purchasing will be making that decision together. But Group II agencies, as well as Group I agencies buying within their delegated authority, have this additional problem.

Do you use a contract, or is a purchase order the proper commitment document that the Controller will approve?

The purchase order . . . remember the more simplified process . . . is appropriate for goods or services costing less than \$25,000 and for simple purchases of goods regardless of amount. Professional services contracts, construction contracts, and real estate leases almost always have to use State contract formats and require legal review. Fiscal Rule 3-1 also says that State contracts must be used whenever purchase orders are not considered sufficient to adequately protect the State. As a practical matter, most agencies purchase consulting and other personal services, regardless of value, using a State contract, mostly because the terms and conditions on the purchase order are not adequate to protect either party. Anytime a vendor wants to start adding lots of terms and conditions that do not appear on the reverse of the purchase order, you are negotiating a "State contract" that has to be approved like any other. Chapter 6 of the *Manual* discusses other considerations in choosing whether a contract better protects the interests of the State.

Delegated agencies have to make these decisions about choosing the proper commitment document where they are purchasing goods or services within the scope of their delegated authority.

Sole Source/Emergency Procurements

Before we get on with special purchases, and discuss the other agencies that are involved, one other topic should be introduced. You may hear people in your agency talk about "sole source" contracts, such as a contract with a vendor where it has the proprietary rights to all the technical data necessary to maintain computer equipment or software. When there is only one vendor who can perform the work, there may be grounds to bypass all the competitive processes. Similarly, where because of true, unforeseen emergencies, an agency does not have the time to compete a contract, there may be grounds to limit competition based on a finding of an "emergency." There is more about these exceptions to competition requirements in Chapter 4.

In the case of your computer and maintenance contracts, how would you procure them? Well, assuming you are a Group I or Group II agency, you can probably use a purchase order to purchase the computer. Unless the vendor will accept the State's purchase order with a description of the maintenance services and the price, you may have to write a contract, signed by both parties, that defines the services. And, **of course you remembered:** the Department of Personnel will have to approve the services acquisition by either method. Either Group I or Group II agencies could execute the commitment documents for this small purchase; nondelegated agencies, on the other hand, would have to submit a purchase requisition to the Division of Purchasing if they can issue a purchase order.

Other Agencies/Special Procurements

We don't want to make this too simple for you! There are a host of other "players" for specialized procurements. Here is just a brief summary of the offices that are required to approve these

purchases. These approval requirements are established by State Fiscal Rule 3-1. Please see Chapter 2 for a more detailed discussion.

State Price Agreements

These are what some people call "blanket ordering agreements." They are price agreements with vendors that set prices and terms of performance for some kinds of goods and services, e.g. computer programming services, that can be ordered by any State agency. Only the Division of Purchasing can negotiate and sign these price agreements. The good news is: any agency, no matter how much delegation it has, can use these price agreements. Some of the price agreements are mandatory, so you need to become very familiar with them as you start working. The Division of Purchasing maintains a list of mandatory and permissive price agreements. Personal services that are ordered off of State price agreements need to be approved by State Personnel, just as any other personal service document.

Real Estate Contracts and the Office of State Buildings Programs

Real estate lease agreements have to be approved by the Office of State Buildings Programs. Unless your agency is one of the few that can do its own construction and real estate transactions, e.g. the Department of Transportation, this office also sets the policy and approves the forms for construction contracts, architect/engineering contracts, and related consulting agreements. Some agencies like the Divisions of Wildlife and Parks and Recreation have independent authority to do these real estate transactions, so if you are in those agencies you need to know the limits of your authority. Also, State Buildings Program delegates authority to approve some of these agreements to some of the larger agencies, like the Departments of Corrections, Human Services, and higher education institutions. In general, these are specialized forms of contracting with formats, procedures and even vocabulary unique to the construction and real estate industries. Because they are so unique, a separate Annex to the *Manual* is reserved for leasing and construction forms and procedures. The Controller or his designated representative is still central to the process, and even though the contract forms are unique, the Controller's signature (or his delegate) still appears on all of these documents that obligate State funds.

Colorado Information Technology Services (CITS)

Contracts involving telephone, radio, microwave, teletype, closed circuit television, video conference, cellular phones, and circuits require the approval of CITS or a delegate.

Division of Central Services

The Central Services director must approve State agency acquisitions for goods and services that are centrally procured. Examples are contracts for motor pool operation/vehicles, vehicle maintenance, printing and binding, graphic design, mail or messenger services, office copying, microfilming, or design of forms. Some of these restrictions are limited to the Denver metro area, but you need to coordinate with that office if you anticipate contracting for these kinds of services.

State Risk Manager

This office manages the State funds for worker's compensation and self-insurance funds to protect the State against lawsuits arising out of negligent acts by employees. The State Risk Manager

also works with the Division of Purchasing to establish insurance requirements for State contracts. You may be working with this office to define suitable insurance requirements in your contracts. Also, the State cannot commit to pay another company's liabilities, called "indemnification." There is a very limited exception in the case of State leases of other people's property, and the State Risk Manager has to approve those kinds of indemnification clauses in contracts.

Routing Contracts for Approval

All approvals are formally done after the vendor selection is completed and the contract is signed by the parties. If you have any question about whether your contract will get approved, you should coordinate with the State Controller's Office (SCO) in advance. After the vendor and your agency have signed the contract, it will be ready for review by the central approvers.

When routing a contract for central approver signatures, a "routing slip" is attached to the agreement prior to sending it around to the various offices. Chapter 8 contains a summary of the approval routing requirements and key information from the offices involved in the central approval process.

In March 1996, the State started using a central computer system to track contracts through this routing process. The agency enters some basic information about the contract, such as their agency's COFRS designation, (e.g. three letter alpha code - HAA for the Department of Transportation), the encumbrance amount, type of contract, vendor name, etc. COFRS automatically assigns the contract a routing number after all of the data is entered. The agency then "screen prints" the CLIN and CLI2 tables, puts it on the top of the contract package and forwards the entire package to the State Controller's Office for routing between those approving agencies. You, of course, have to designate who needs to see the contract. So you have to know all of these rules, and who the applicable "players" are in any given contract. (With regard to the COFRS contract tracking system, the requirements for higher education institutions may vary.) The CLIN procedures and agency accounting procedures may be found in Chapter 7.

The "Big Picture"

Sometimes in the maze of approval requirements, we forget the ultimate objective--to sign a contract that is enforceable and has a price/cost that is "fair and reasonable" for the good or service being purchased. When you start writing contracts, you will learn that--apart from writing nonstandard indemnification provisions and committing future legislatures by signing up for contract obligations extending beyond the current fiscal year (both of which are not problems if you use the *Colorado Special Provisions*), you will see that you have lots of flexibility. None of these offices dictate how you write your contracts. They don't tell you how you must write your statement or scope of work, specifications, what data or reports you need delivered, or what the copyright rights should be in reports, documents, and software. They don't tell you how to link your payments with the delivery of goods and services, so you aren't paying for things before you have a chance to examine them and reject them if they are defective (although an "advance

payment" requires the approval of the Controller). None of those offices will be writing your inspection and acceptance clauses, or defining your warranty rights for you. Nor will they draft clauses that give you the right to terminate the contract if the contractor is deficient in performance. All that is left up to you, although the Division of Purchasing has included some suitable contract clauses in their rules that can be used in contracts to address these problems. Chapter 2 has more information on writing the statement of work and Chapter 6 has examples of the terms and conditions that go into contracts. Chapter 5 discusses pricing.

Office of the Attorney General

People may feel otherwise, but the Attorney General's office really has no policy that it writes in rules and enforces. The Attorney General's office is the advisor to the Controller and is the final stop prior to approval of the State contract by the Controller. Purchase orders and interagency agreements with other State agencies are not reviewed by the Attorney General.

Sure, the attorneys look to see if the Colorado *Special Provisions* are included (and not amended), whether all the exhibits referred to in the contract are attached, and whether the proper parties have signed the contract, but the review goes farther. The Attorney General's office steps back and tries to understand the deal, determines if it makes sense, and assesses whether the statutory and regulatory requirements (and there aren't many) are satisfied. Then the attorneys ask this question, "Is the contract sufficiently definite, the requirements specific enough, and the payment provisions well enough defined, so we know what we are getting, when we are getting it, and for what cost? Are there rights or remedies the State can exercise if performance isn't acceptable, so the State is not paying money without getting fair consideration in return?" This is the "big picture" from the Attorney General's perspective.

As you can probably tell, deciding whether laws and policies are satisfied and the contract is otherwise "legally sufficient" requires the attorney to understand your "deal." Hopefully, the contract and supporting file speak for themselves. Often, though, the attorney reviewing the contract will call you or the program contact to discuss the meaning behind language, apparent inconsistencies or omissions, and other ambiguities in the agreement. If there is unusual language in your agreement--that the vendor put there perhaps--and you don't know the history or rationale behind it, then the contract may be recommended for disapproval. Why? Well, interpretation of a contract in a court usually hinges on what the parties themselves thought the language meant. If you don't know, or you haven't talked about it with the other side, then a disapproval may force you to clarify the language or other aspects of the contract.

A Return Visit to the State Controller's Office

Remember that the contract is not effective until approved by the State Controller or his delegate. Once the contract gets to the State Controller's Office, you are almost "home free"! But remember, the Attorney General is enforcing policies that are in the statutes and rules that govern spending and required elements in contracts. The Attorney General will commonly highlight

potential legal problems for the Controller, who ultimately can approve or disapprove a contract. For example:

1. The Colorado *Special Provisions* not only must be included, they can't be modified unless approved by the State Controller. One "felony" is inclusion of an indemnification provision in the contract that conflicts with the one at paragraph 4 of the *Special Provisions*, without written justification and approval by the Controller. The "capital offense" is including an indemnification provision that requires the State to indemnify the contractor for damages it incurs as a result of contract performance. As we mentioned before when talking about the Risk Management office, such a clause usually is illegal because it violates the Colorado Constitution. Besides, it's not fair. We are paying contractors to do the work. We shouldn't have to answer for their liability. Lesson: read the *Special Provisions*, include them, **never** change them. If you are negotiating a contract that uses the term "indemnify" or "hold harmless", you better get the advice of counsel and be prepared to justify in writing why you need the clause.
2. State Fiscal Rules require that advance payments be approved in writing by the State Controller or an authorized delegate.
3. Any modification/amendment procedure in the contract that attempts to informally change the contract without processing as an amendment will probably be disapproved. The Controller has to approve all commitment documents, including amendments. The Controller requires formal routing and legal review of all amendments by Fiscal Rule. You can't change this Rule by contracting with the other party to permit changes and price increases by mutual agreement. There is an exception: you can use a modification mechanism consistent with the State Controller's policy on contract modifications and change orders, enclosed in this *Manual* in the Policy Letters Annex. For example, the policy has an approved Change Order Letter process that bypasses Attorney General review for use in grant and subgrant programs that provide for benefits to third parties, e.g. contracts for health or social welfare benefits where the volume of services being provided are directly proportional to the level of funding.
4. Attempts to create financial obligations beyond the current fiscal year--the "binding the future legislature" problem--are illegal. That is why the Colorado *Special Provisions* has a clause at paragraph 2 that conditions contract performance on availability of funds. Remember, generally the State appropriates money from year-to-year. Unlike private individuals and companies, you can't agree to a contract that unconditionally extends funding for more than one year at a time. One more reason to include those *Special Provisions* . . .
5. Encumbrance errors can also cause a contract to be disapproved by the Controller. If you cite the wrong source of funds, or there are not enough funds to satisfy the commitment, or the contract has open-ended price/payment provisions or no ceiling on the amount to be paid, the contract will be disapproved.

After Contract Approval - First a Celebration! - Then Contract Management

You can write the best contract in the world, but if no one is inspecting the goods or services to assure their compliance with requirements, money is going to be wasted. Writing a good contract is a giant step towards sound contract administration and management, because it should clearly define the expectations of both parties. But you need to have a process in place to insure that payment is not made under the contract until acceptable performance has been received (hopefully a right given you in the contract . . .). This is a lot simpler to say than to do. As a result of a State performance audit in 1995, and the work of the Contract Management Task Force, a whole chapter has been added to this *Manual* that addresses contract administration issues and responsibilities. The sections in Chapter 10 describe contract monitoring responsibilities, performance remedies, and other key aspects of managing a contract.

Contract Improvement Initiatives in Colorado State Government

In 1994, the central approving offices banded together to find ways to improve the contract approval process by creating a group called the Central Approval Task Force (CATF). Part of that process was the formulation of the Colorado Contract Improvement Team (CCIT), a group composed of representatives from all of the State agencies. The CATF meets monthly, and the CCIT quarterly. The CATF/CCIT structure is designed to foster cross-feed among central approvers and agencies of ideas related to contracting, provide a forum for discussing improvements, and generally serve as a clearinghouse for purchasing and contracting-related information that is important to State employees involved in the process. The CCIT and CATF publish the *Contract User's Resource for Excellence (CURE)* newsletter monthly, and subcommittees have been established to address issues such as contract standardization, coordination of statutes and regulations, improvement to the *Manual*, training, etc. This *Manual* was a byproduct of work done by the CCIT, based on recommendations received from users.

Agencies are encouraged to set up their own "user groups," and you should find out when your user group meets. The CCIT lives and breathes by the quality of these user groups--they are the vehicle to "get the word out" to everyone else in the agencies that are involved in the contracting process.

One Final Note - This Stuff Isn't Easy

You can't just read this summary and expect to do a good job in purchasing or contracting. This is just the road map into the more detailed material in the *Manual*. The Division of Purchasing training will give you much more detailed, invaluable information about vendor selection. Even more important, you have to ask questions of the other purchasing and contracting professionals you work with. If you get contracts back from central approvers disapproved or with comments, make sure you understand why. Share your mistakes, successes, ideas, and experiences. We think you will find opportunities to keep learning and continually improve your purchasing and contracting process.

References

The following is a list of some of the available resources that provide guidance for the contracting process:

⇒ Colorado Revised Statutes

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| • Title 24, Article 30, Part 14 | Negotiation of Consultants' Contracts |
| • Title 24, Article 91 | Construction Contracts with Public Entities |
| • Title 24, Article 92 | Construction Bidding for Public Projects |
| • Title 24, Articles 101-111 | Colorado Procurement Code |
| • Title 38, Article 26 | Contractor's Bonds and Lien of Funds |

⇒ Code of Colorado Regulations

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| • 1 CCR 101-1 | Fiscal Rules |
| • 1 CCR 101-9 | Procurement Rules |
| • 4 CCR 801-2 | Personnel Rules on Personal Services Contracts |

⇒ Policy letters:

- Contract Modifications, Changes, Amendments, and Approval Routing, 1/8/97 (Office of State Controller)
- Purchase Order Modifications/Incorporation of Vendor Contracts, 6/24/96 (Office of State Controller/Division of Purchasing)
- One-Step Grant Applications/Award Contracts, undated (Office of State Controller)
- Routing Waiver Guidelines/Application, 3/14/96 (Office of State Controller)

⇒ Federal Policy, Regulations, and Office of Management and Business (OMB) Circulars

- The Common Rule, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments
- OMB Circular A-87, Cost Principles Applicable to Grants and Contracts (State and Local Governments)
- OMB Circular A-122, Cost Principles Applicable to Grants and Contracts (Private Nonprofit Organizations)
- OMB Circular A-21, Cost Principles Applicable to Grants and Contracts (Educational Institutions)
- Form 1099 Reporting Manual

⇒ Colorado Financial Reporting System (COFRS) Manual

⇒ Newsletters:

- CURE, published by Colorado Contract Improvement Team (CCIT)
- Risky News, published by the Risk Management Office
- State Building News, published by State Buildings and Real Estate Programs

Agency Supplement (Insert)

THIS SECTION IS RESERVED FOR AGENCY SUPPLEMENTARY MATERIAL OR POLICIES RELATED TO THIS CHAPTER, SUCH AS:

- **INTRODUCTION TO THE AGENCY MISSION**
- **OVERVIEW OF COMMON CONTRACT TYPES AND PROCUREMENT METHODS IN THE AGENCY**
- **COMMON PROBLEMS SEEN IN AGENCY CONTRACTS**
- **OTHER REFERENCE/TRAINING MATERIALS AVAILABLE FOR LEARNING AGENCY-SPECIFIC CONTRACTING**